

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

ORIGINAL

74-1094

To Be Argued By
ARLENE R. SILVERMAN

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. :
CORNELIUS LUCAS,

Petitioner-Appellant, : Docket No.
: 74-1094

-against-

PAUL J. REGAN, Chairman, New York
State Division of Parole, :

Respondent-Appellee. :

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BRIEF FOR RESPONDENT-APPELLEE



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BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Did the trial court's denial of appellant's motion for a continuance to further attempt to locate and secure evidence of speculative relevancy deprive him of due process of law?

2. Was the victim's in-court identification of petitioner proper where she had ample time to observe him during the robbery and positively identified him as one of the perpetrators?

3. Was petitioner deprived of due process where the incentive for an accomplice's testimony was fully disclosed to the jury.

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York, entered on November 9, 1973 (Constantino, D.J.) which denied petitioner's application for a writ of habeas corpus. The District Court granted a certificate of probable cause and leave to appeal in forma pauperis.

Prior Proceedings

On September 5, 1968, petitioner was convicted in the Kings County Supreme Court after trial by jury of the crimes of robbery in the first degree, grand larceny in the first degree, and assault in the second degree. He was sentenced

to state prison for concurrent sentences of ten to twenty years, five to ten years and two to two and a half years respectively. Petitioner is presently in the custody of Paul J. Regan, Chairman of the New York State Division of Parole, having been paroled from Walkill Correctional Facility on February 22, 1973.

Petitioner attacked his conviction on various grounds in the Appellate Division, Second Department and in the New York Court of Appeals via a direct appeal of the judgment of conviction and the appeal of a denial of a writ of error coram nobis raising, inter alia, the claims raised here, i.e., that his conviction was unconstitutional because

(1) he was denied a continuance (a) to enable the defense to secure the attendance of an alleged crucial witness and (b) to secure compliance with a subpoena for psychiatric records of an accomplice.

(2) there was a prejudicial station house show-up of petitioner to the complainant.

(3) both the trial court and prosecutor failed to correct allegedly false testimony of an accomplice as to the terms of his agreement to turn state's evidence.

The direct appeal and the coram nobis denial were consolidated on appeal. The Appellate Division, Second Department affirmed without opinion. 33 A D 2d 994 (1970). The New York Court of Appeals also affirmed without opinion, Judge Breitel dissenting [reported at 28 N Y 2d 761 (1971)].

A motion for reargument in the New York Court of Appeals was denied. 29 N Y 2d 549 (1971). The Supreme Court denied certiorari. 404 U.S. 994 (1971).

The Trial

On May 19, 1965, before the trial in the action actually began, Norman Adderly, a co-defendant, offered to plead guilty to Robbery in the First Degree, Unarmed (2-4).* The Court then questioned Adderly who admitted the charges and implicated Lucas and Polhill (5-73). All defendants and their attorneys were present in Court during the proceedings. The Assistant District Attorney then revealed that it was his understanding that if Adderly testified at trial, then the First Degree Robbery plea would be vacated and a plea of Attempted Robbery in the Third Degree would be accepted (73-74).

* Numerical references are to stenographer's minutes.

The Court said Adderly must tell only the truth and that the Court assumed that what he had just related was the truth. Adderly said he still wanted to take the plea (75). The Court then said that Adderly must tell the gospel truth on the witness stand even if it varied from what had just been related (78).

The trial began and in the opening of the People, the prosecutor informed the jury that Adderly had been promised consideration (92). The attorneys for the defendants told the Court and the prosecutor that the defenses would be alibi and that identification was in issue (90).

Norman W. Adderly testified that he was a defendant in this case, had a prior conviction and pleaded guilty to Robbery in the First Degree concerning the charges at bar. The witness said that if he told the truth he had been promised that the plea would be changed to Attempted Robbery in the Third Degree (106-07).

Adderly said that he met Polhill and appellant on April 23, 1964 at about 9:00 or 9:30 P.M. and they went to Almeta Gardner's house with one James Brown. (Apparently a misprint in the record exists and the witness really meant Viola Jackson's house) (108-09). Brown told them that a numbers writer had about \$5,000.00 in her house, under a pillow,

to pay off someone who had been a winner (111-13). Polhill, Lucas and Adderly, after agreeing to secure the money (113-14), went to Almeta Gardner's house. Adderly knocked, a lady answered and they all forced their way in with guns drawn (116-17). Adderly told the woman they wanted money and Lucas began to search the apartment (117-19). Polhill was near the bathroom from which a man's head suddenly protruded. The witness then heard a slapping sound (118-19). Adderly forced Mrs. Gardner into the bedroom, made her lie on the bed and tied her hands and feet (120). Polhill searched the woman's pocketbook and took some money out (120-21, 123-24). The victim said she did not have the "hit" money but had given it to her sister who lived across the street (121). Adderly gagged Mrs. Gardner but did not blindfold her and they all thereafter left after having been in the apartment for about 10 minutes (123-24).

Adderly, Lucas and Polhill drove to a bar on Fulton Street and on the way Polhill divided up the money, each of them, including Brown, receiving \$18.00 (125-26).

The witness looked at an Army model Colt .45 gun and identified it as the one used by Polhill in the robbery. The gun had sandpaper marks on it which the witness recognized. After a voir dire, the pistol was admitted in evidence (129-35).

Another gun was shown Mr. Adderly which he identified as the .38 caliber snubnose revolver which he used that night. He had given the .45 to Polhill and Polhill had given the .38 to him (136-39, 142). Lucas had used a Beretta during the commission of the crime (143).

Adderly was arrested two days after the robbery, along with Polhill at about 9:30 or 10:00 at night while they were in Adderly's mother's automobile (144-45).

On cross-examination Adderly said he denied participating in the robbery when first questioned by the police but he had lied (157). The witness said that before he took the plea he knew he would take the witness stand and testify to the truth that the others were involved in the crime. That was the reason he was getting the Attempted Robbery Third Degree plea (164-65). It was not his understanding that he had to include the others if it was false, only if it was true (165-66). The witness had a prior conviction for Manslaughter (168). He had the .38 revolver a long time and had gotten the .45 a few weeks prior to the crime and kept it in the closet of Mrs. Jackson's apartment, his girlfriend (174).

Upon further cross-examination Adderly said that the alibi he gave to the Assistant District Attorney in the Precinct was a lie (181-82), that if convicted here he would be faced with additional penalties as a second felony offender (199-201),

but that the deal he made was conditioned on him taking the witness stand and telling the truth (202-203). The witness further said that after the robbery he and Lucas and Polhill agreed to have alibi defenses and he had lied in the Precinct in accordance with that agreement (211-12).

Carl Junior Gardner, the husband of Almeta Gardner, was taking a bath on April 23, 1964 (222-23). He heard his wife yell and he jumped out of the bathtub. As he was opening the door, he was struck on the side of his head with a gun by a man who told him to get back in the tub (224-25). He saw the man and the gun and although he was bleeding, he did what he was told (225). The man left the bathroom but the witness could not get out until a chair which had been placed against the outside of the door was removed (226). The police were called and after they arrived, the witness was taken to the hospital (227). The witness identified Polhill as the man who hit him with the pistol (231-32).

On cross-examination the witness said he had seen Polhill in the police station and may have seen him in Criminal Court (237-38). Polhill was wearing a brown hat at the time of the robbery but the witness could not recall if he was wearing a tie or jacket (238-39). The first time he saw Polhill after

the robbery was through a peephole at the precinct (241). There were about five colored men in the room with Polhill when the witness picked him out and the witness did not recall any of them wearing uniforms (246-48).

Almeta Gardner was ironing in her apartment while her husband was taking a bath on the evening of April 23, 1964 (274). She heard a knock on the door and asked who it was. After a voice answered "Elijah", she opened the door and three men forced their way in (276). The lights were on and she saw all three men. Adderly grabbed her around the mouth and she was forced into the bedroom (277). All three men had guns (277). Adderly said that if she screamed he would kill her (273). She also said they took some money from under the pillow (278). The witness identified Polhill and Lucas and said they had guns (280).

Mrs. Gardner said that she saw the bathroom door start to open and that Polhill went over and raised his hand with a gun in it (281-82). She heard a noise and then Polhill closed the door (282). The witness then identified Adderly as the third man and said that while Adderly tied her up with a sheet, Lucas searched the apartment (283-86). About \$140.00 was taken from under the pillow and from her pocketbook (287).

Adderly asked her for the rest of the money and she told him it was at her sister's house. She gave them a false address and they all left (290-91). The witness said that the Colt .45 looked like the gun Polhill had and the .38 looked like the one Adderly had (291-92).

The witness thereafter worked herself loose, went to the bathroom, removed the chair and found her husband bleeding (294). She called the police and after they came, her husband was taken to the hospital (296-97). She said she did not pay attention to the clothes of the three men, but could not forget their faces (302). On April 26 she went to the precinct and saw about six men through a peephole (309-12). None of them were wearing uniforms (313). She identified Adderly, Polhill, and as to a third individual, a Ulysses Bryant, she said she was not sure (317-22, 366, 369). Polhill had not worn a hat during the robbery but Adderly had (355).

Detective Arthur W. Broughton was on duty on April 23, 1964 and was waiting in front of 799 Marcy Avenue (373-74). Through binoculars he saw two men enter the building. He later saw Lucas pull up, enter the building and fifteen minutes later three men came out and drove away (370-75). Lucas was driving, Polhill was next to him and the third man was Adderly (376). He followed the car and after two stops, it stopped again at Bergen Street and Classon Avenue, about 200 feet away from

660 Classon Avenue, where Mrs. Gardner lived (377-79). On Saturday, April 25, the witness was present when Adderly and Polhill were arrested (380). Lucas was arrested the next day (382).

On cross-examination the witness said he was the one who found the gun in the car in which Adderly and Polhill were arrested (388).

The prosecution rested and defense motions to dismiss were denied (400-03).

Barbara Polhill was the first defense witness. She said that on the evening of the robbery her husband was home all evening except when he went out from 7:00 P.M. to 8:00 P.M. or 8:30 P.M. He did not leave between 8:30 and 12:00 except to walk Miss Myrtle Brown to get a taxi at around midnight. A friend of Miss Brown, whose name was not recalled, was also there (408-09).

Myrtle Brown testified that on April 23 she arrived at appellant's home about 9:00 P.M. and stayed there until 12:00 (429-30). Polhill was there the whole time and did not leave except to walk with her to get a taxi (431).

Cornelius Lucas, the appellant, said that after leaving the barbershop at about 7:45 P.M., he went to a service station at Atlantic Avenue and South Oxford Street. He picked up a transmission, towed it to Atlantic and Clinton and attempted to put it in his car (443). He worked on the car from 8:30 until 11:15 P.M. (444). He stopped at 722 Fulton Street from 12:30 until 1:00 A.M., and then went home (444). He was not with Adderly or Polhill that evening and took no part in the crime (444-45, 447).

On cross-examination, Lucas admitted a prior conviction for embezzlement and that he owned a white Cadillac similar to that described by Detective Broughton (457, 462-63).

Viola Jackson said that Adderly was at her home and left around 9:00 P.M. Polhill and Lucas were not there that night as Adderly had previously testified (474-75). Adderly returned to her apartment alone at 11:00 o'clock (476). On cross-examination the witness said that Adderly had been her boyfriend but had stopped coming to her house in December, 1964 (489-498).

Clarence Oliver Wallace, a mechanic at a gas station on Clinton Street and Atlantic Avenue, said that Lucas came in about 7:00 or 8:00 P.M. (503-05). He worked on the transmission for a while and they both went to a bar on Fulton

Street until 1:00 or 2:00 A.M. when they broke up (505-06). The witness had a prior conviction for Possession of a Gun (507).

Cornelius Lucas was recalled to the witness stand and after the close of the case, the sixth count of the indictment, charging burglary, was dismissed (526).

The jury convicted both men of Robbery in the First Degree, Grand Larceny in the First Degree and Assault in the Second Degree.

The Coram Nobis Hearing

At the coram nobis hearing, petitioner tried to prove that Adderly was insane and that if the jury knew his mental background, which supposedly was suppressed by the prosecutor, a conviction could not have occurred.

The hearing began on May 20, 1968. Norman Adderly testified that he had been committed to Kings County about a month and a half before the trial, and spent about 5 days there because of a headache (5/20/68, pp. 3-4). The Court looked at the report (4). Adderly said he had no treatment, he was not interviewed by any doctors and no one spoke to him about his condition (4-5).

He did not tell the District Attorney about the headache, which he did not have during the trial (5), because he assumed they knew about it because they brought him from the hospital to court (4). The witness said he had said the same thing on trial (6).

The Court read the report and said that nothing was in it that would carry over to trial and that it said that Adderly was not insane (7).

There was some question about whether Adderly had been there a year before the trial, when they were first arrested, but the Court said even if that were true, it would make no difference (10-11).

The hearing continued on October 3, 1968, when Bernard Brownstein the trial prosecutor, testified. He said that until Adderly was asked on cross-examination at the trial if had ever been in a mental institution, he had no knowledge at all about whether Adderly had possibly been committed for psychiatric observation (10/3/68--p. 5-6). That answer was true up until the very moment of that hearing (6). He withheld no information of this kind from Cornelius Lucas at the time of the trial (6). It also appears that when Adderly denied being in a mental institution, he said to the jury that he had been under psychiatric observation at Kings County Hospital (14).

Dr. Anthony Jiminez, a psychiatrist affiliated with Kings County Hospital, said he examined Norman Adderly and he read the Kings County psychiatric records (22-23). On May 4, 1964, a Dr. Saland, a psychiatrist, wrote a letter stating he was transferring Adderly from Rikers Island to Kings County for observation because he had seemed irrelevant, incoherent, hostile, agitated and apparently had some delusions (24-25). Dr. Saland said these might be paranoid schizophrenic (25).

After Adderly came to Kings County, the witness observed him and discharged him on May 11, 1964 (26-27). He was returned to the Queens House of Detention with a request for a formal order for further observation, but Adderly was returned to the House of Detention (27).

The witness said his diagnosis then was of anti-social personality but no diagnosis of mental illness was made (28).

That occurred on May of 1964 and if Adderly testified a year later in a trial, there was no way to tell what his mental condition would be without a re-examination (28).

The diagnosis of the witness was confirmed by a similar one made about three weeks before by a Dr. Winkler, also attached to Kings County, who was deceased at the time of

the hearing (29). A third psychiatrist, Dr. Podolsky, also at Kings County, also found no evidence of mental illness and his report was read into the record (30).

Subsequent to the hearing, on October 8, 1968, Justice Rinaldi denied petitioner's application with the following statement:

"Upon the conclusion of the hearing, the Court finds that the contentions made by the petitioner are unfounded and are not supported by the proof adduced at the hearing. The motion is therefore denied."
(Rinaldi, J.)."

Opinion of the District Court

Judge Constantino found that Judge Gittleson's denial of a continuance to locate Ulysses Bryant was a proper exercise of his discretion. Judge Constantino considered the circumstances surrounding the trial judge's decision, i.e., that the judge had been presiding over a jury trial which had been under way for five days, that counsel had four days to locate the witness, that petitioner at all times prior to trial knew of Bryant and found this first claim without merit.

As for the claim that more time should have been allowed to produce Adderly's psychiatric records, the District

Court noted that the coram nobis hearing fully explored Adderly's competency as a witness, finding him to be competent. Moreover, defense counsel had every opportunity to cross-examine Adderly as to his psychiatric condition. In addition, the records themselves were a year old at the time of trial and would have been of limited utility.

As for the show-up claim, Judge Constantino found that there was no evidence of any suggestion to Mrs. Gardner that petitioner was the third robber. The identification took place only three days after the robbery and Ms. Gardner had gotten a good look at all three robbers during the crime itself. Viewing all the circumstances, Judge Constantino found that the identification of petitioner was not so suggestive as to give rise to a substantial likelihood of irreparable misidentification.

Finally, the District Court found petitioner's claim that the jury was not apprised of the bargain between Adderly and the prosecutor without merit. The Court found that Adderly's motives for testifying were before the jury and that there was no undue bias in his asserting that he had been told to tell the truth.

The application for a writ of habeas corpus was denied.

POINT I

THE TRIAL COURT PROPERLY REFUSED TO GRANT DEFENSE COUNSEL A CONTINUANCE FOR THE PURPOSE OF LOCATING AND CALLING ULYSSES BRYANT AND FOR SECURING COMPLIANCE WITH ITS SUBPOENA FOR PSYCHIATRIC RECORDS.

Petitioner argues that he was denied due process because the trial court refused to grant him a continuance to locate Ulysses Bryant and to obtain compliance with its subpoena for psychiatric records. However, the decision whether to grant a continuance rests within the discretion of the trial court, the sole requirement being that the court's decision be reasonable. Mere errors or mistakes of law committed in the conduct of state criminal trials are not reviewable in federal habeas corpus unless they amount to a deprivation of fundamental fairness. Lisenba v. California, 314 U.S. 219, 228 (1941). Applying this test to the record at bar, it is clear that Judge Gittleson's denial of petitioner's request was in all respects proper and that his current constitutional claims are without merit.

A. Ulysses Bryant

At the outset, contrary to petitioner's statement in this Court (Brief pp. 27-28), Mrs. Gardner testified at trial

that she never definitely identified Ulysses Bryant as one of the perpetrators. While specifically and definitely identifying Adderly and Pohill at the stationhouse, as regarded Bryant, she informed the police that he was not the right man (322) and as soon as she saw the right man, she told them.

As Judge Gittleson point out, defense counsel had over four days to locate and call this allegedly necessary witness. Absolutely no explanation was given to the Court for petitioner's failure to call Bryant nor did defense counsel explain what steps, if any, had been taken or would be taken to locate him.

Petitioner's brief in this Court alleges that counsel had dispatched an investigator to Bryant's last known address in an attempt to locate him. However, this fact was not disclosed to the trial judge. As was stated in United States v. Ellenbogen, 365 F. 2d 982, 986 (2d Cir. 1966); cert. den. 386 U.S. 923:

"The trial court's exercise of discretion can only be tested in light of the reasons disclosed at the time the motion was heard and not on the basis of more elaborate representations argued on appeal."

Moreover, even if the alleged dispatching of an investigator had been disclosed to the trial court, it can hardly be expected

that the case against petitioner be continued without some fuller explanation as to what further steps were being taken to locate Bryant. This was, after all, a jury trial, and considering Mrs. Gardner's testimony and the questionable probative value of the offer of proof, Judge Gittleson properly denied the defense motion. And, of course, petitioner has failed to demonstrate here that Bryant was ever found or would be available to testify even now.

Defense counsel was free to question Mrs. Gardner as to the differences in appearance of Bryant and petitioner. Detective Broughton testified concerning the arrest of Ulysses Bryant (387) and he also could have been cross-examined as to Bryant's appearance. In this connection, petitioner testified that Bryant had been incarcerated with him (522)* and a mug shot of him could have been obtained and used during trial, especially on Detective Broughton's cross-examination.

Faced with these facts, counsel in this Court, endeavoring to make an attractive case for collateral relief,

* In addition to petitioner's own testimony at the trial that he knew Bryant, petitioner's brief in this Court additionally points out that Bryant was Adderly's cousin. It is thus apparent that all the defendants in this case, as well as Bryant, were socially acquainted with one another.

is attempting to portray Bryant as an important witness whose viewing by Mrs. Gardner at the time of Adderly's and Pohill's arrest should have been disclosed to the defense well in advance of the trial. In this vein, petitioner argues that the prosecution deliberately suppressed Mrs. Gardner's viewing of Bryant at the police precinct notwithstanding that such an argument was never presented on appeal in the New York Courts. 28 U.S.C. 2254(d). Petitioner has thus apparently chosen, in this Court, to overlook the fact that during Mrs. Gardner's testimony, a copy of a stenographic statement was turned over to the defense by the prosecutor which indicated that Bryant had appeared in the lineup with Pohill and Adderly and that far from any deliberate suppression, as alleged by petitioner here, there was no suppression at all.

Petitioner's brief at bar is an example of that type of hindsight thinking which would impose an impossible task on even the most conscientious prosecutor. Cf. United States v. Keogh, 391 F. 2d 138, 148 (2d Cir. 1968). Adderly and Pohill were arrested two days after the robbery incident (380) at a time when Ulysses Bryant was riding with them in a car. They were all routinely placed in a lineup; Mrs. Gardner positively identified Adderly and Pohill, and did not positively identify the third robber (322). Lucas was then in the process of being apprehended and Mrs. Gardner immediately identified him.

when he was brought to the stationhouse (322). Petitioner in this Court is simply attempting to enhance the importance of a relatively minor event in the course of the police investigation of this case.

As the Court stated in Moore v. Illinois, 408 U.S. 786, 795 (1972):

"We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."

Petitioner's claim here regarding Ulysses Bryant cannot withstand analysis. Mrs. Gardner never identified him as one of the robbers and Detective Broughton placed petitioner at the scene of the crime with Adderly and Pohill. The defense made no adequate showing sufficient to warrant the granting of a continuance and it is clear that Bryant's appearance, if relevant at all, could have been proved by alternative means.

B. The Psychiatric Records

Petitioner's entire argument in this Court insofar as Adderly's psychiatric records are concerned is an attempt to create an issue for reversal by shifting the onus of the

defense's lack of due diligence in obtaining Adderly's psychiatric records to the trial court, claiming that the trial court's denial of a request for a continuance to secure the records was a violation of due process. However, Judge Gittleson recognized this defense tactic for what it was and properly denied petitioner's request for a delay.* Jones v. Swenson, 469 F. 2d 535 (8th Cir. 1972).

Defense counsel had more than ample time to secure the records from the Kings County Hospital, and to have them produced in the County Courthouse, also in Kings County. Even assuming arguendo that the defense did not learn of Adderly's psychiatric records until the first day of trial, petitioner had until the fourth day to assure that they were on hand. A simple phone call on the second or third day of trial to the Hospital would have insured that the documents were produced.

Petitioner, in this Court, is trying to compare himself with the defendant in People v. Rensing, 14 N.Y.2d 210 (1964) and

* Appellant's argument that the prosecutor on appeal conceded that the denial of the continuance was error has no relevancy to this Court's inquiry. Young v. United States, 315 U.S. 257, 258 (1942). Moreover, the Kings County District Attorney simply preferred to argue that any alleged error was harmless since Adderly was found competent to testify and never diagnosed as mentally ill. Respondent in the District Court has at all times maintained that the trial court properly exercised its discretion in denying the continuance.

to portray Adderly as an individual with a serious mental disturbance. However, Adderly was simply sent to the psychiatric ward at Kings County for observation, certainly not an unusual occurrence for inmates detained prior to trial by the New York City Department of Correction. Other than this pretrial observation, petitioner has failed to show any prior psychiatric history regarding Adderly or any developments subsequent to his incarceration on his plea in this case to support his theory here that Adderly has a psychiatric disorder.

Significantly, at the time of the request, the defense had not even examined the records to ascertain the relevancy, if any, of the documents and again defense counsel failed to justify the need for a continuance to the Court. As Judge Gittleson observed (517), defense counsel was merely speculating as to the probative value of the documents and, as in the case of Bryant, it was apparent that the defense entertained no real serious belief that petitioner would be benefited by the production of the records.

It is uncontested here that Adderly, as the state coram nobis judge found was competent to testify* and petitioner's only argument at bar is that Adderly's psychiatric records should have available to the defense for purposes of

* Such a finding is, moreover, entitled to a presumption of correctness here. 28 U.S.C. 2254(d).

impeachment. However, even assuming that the subpoenaed records had been secured by the defense, the psychiatric records would have only been available for cross-examination of Adderly, People v. Rensing, supra; Jameson v. Corn Exchange Bank, 191 N.Y.S. 299 (1st Dept. 1921); Matter of Santos 278 App. Div. 373 (1st Dept. 1951), and contrary to petitioner's argument here, it is unlikely that the trial court would have permitted the defense to question the psychiatrists in the presence of the jury who had examined Adderly, such an inquiry being wholly collateral.

Finally, even had the psychiatric records been diligently produced by the defense, they would have been of little value. Adderly was never diagnosed as mentally ill. The three doctors who examined him at Kings County after his arrest found no evidence of mental illness and Dr. Jiminez merely stated that he had an anti-social personality.

Even this diagnoses was made a year before trial and, without a reexamination, such records were of doubtful value (Coram Nobis Hearing, p. 28).

Adderly's testimony at trial was lucid, coherent and consistent with the other witnesses. Adderly had never been diagnosed as mentally ill. There was no reason to disallow his testimony and his credibility would not have been serious undermined by the Kings County Hospital records.

POINT II

COMPLAINANT'S IDENTIFICATION
OF PETITIONER AT THE STATION-
HOUSE WAS PROPER.

Petitioner argues that the complainant's identification of him as the third perpetrator was so conducive to irreparable mistaken identification as to violate due process. However, Mrs. Gardner's identification of petitioner was not suggestive and there was no due process violation.

As the Supreme Court said in Neil v. Biggers, 409 U.S. 188, 198 (1972), "...as Stovall makes clear, the admission of evidence of a showup without more does not violate due process."

"The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of the certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation." Neil v. Biggers, supra, 195.

Applying these factors here, it is clear that the complainant's identification of petitioner was reliable.

When a lineup was first held, Mrs. Gardner picked out Adderly, Pohill, and one Ulysses Bryant. However, she stated at the time that she was not sure, that he looked like the man (314, 317-322, 366, 369). Later on, while she was being questioned by the Assistant District Attorney, a series of men were brought in for her to look at individually.

There were no suggestions of any sort and she immediately identified petitioner. Her willingness not to identify just anyone showed that no one pressured her and that she was exercising her free will, a will which was apparently clear and cogent. As she said: "I told them in the beginning I didn't know for sure that was the man, but as soon as I seen the right man, I told him" (322).

It should also be noted that this identification took place only three days after the robbery (306). She said she saw petitioner close up, the area was lighted and she said that his face left an impression (359, 277). She had also given the police a description, so apparently she was familiar with the faces (306).

She stated she had ample opportunity to observe Lucas. She was told to lie on the bed and she was tied with sheets but she was still able to see. She saw Lucas searching the apartment (288) and she was able to look all over the apartment from the bed (305).

She said that the police did not suggest, when they first asked her to come down to the precinct, that they had caught her assailants (309). She went to the squad room without escort (311) and the police only told her that they wanted her to see if any of the men shown were the men who had committed the crime (311). There were six men in the lineup and she described it in great detail (310-315). After the lineup, men were brought in to her singly from time to time and when Lucas was brought in, apparently the only thing asked of her was if she recognized him (359).

In sum, she had ample opportunity to observe petitioner, her identification of him was positive and reliable, and this testimony clearly admissible. Neil v. Biggers, supra; Stovall v. Denno, 388 U.S. 293 (1967). Moreover, petitioner was linked to the robbery by Detective Broughton and by his white Cadillac car, rendering Mrs. Gardner's identification testimony cumulative and, if error, harmless.

POINT III

ADDERLY DID NOT TESTIFY FALSELY
AND THE JURY WAS AWARE OF THE
CONSIDERATION GIVEN TO HIM FOR
HIS TESTIMONY.

Petitioner argues that the Court and prosecutor permitted Adderly to mislead the jury as to the consideration he would receive if he testified at petitioner's trial and implicated him. Again, however, such an argument finds no support in the record.

The fact is that the possible motives for Adderly's testimony were all set out and inquired into at length (159-168) and the jury was fully aware of the inducements he had to testify, the conditions under which he testified and his motives to tell or not tell the truth.

Specifically, Adderly stated that if he took the stand and told what happened that night, he would be allowed to plead guilty to attempted unarmed robbery in the Third Degree (162). He repeated this again later on, during the cross-examination (202) and replied affirmatively to the question that a further reduced plea was conditioned on him taking the stand (203).

Although petitioner attempts to examine isolated excerpts of Adderly's testimony in an attempt to bolster his position, the fact is that his understanding with the prosecutor was fully disclosed and that the jury clearly understood that Adderly was an accomplice of petitioner who was looking for a break and who stood to benefit by testifying against petitioner. A question of credibility was presented for the jury, as the trier of fact, to resolve.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
May 9, 1974

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) : SS.:

Delene Silverman, being duly sworn, deposes and says
that he is employed in the office of the Attorney General of
the State of New York, attorney for
herein. On the 9th day of May, 1974, he served
the annexed upon the following named person :

Legal Aid Society
606 U.S. Courthouse
Foley Sq
NY NY 10007

Attorney in the within entitled Appeal by depositing a
true and correct copy thereof, properly enclosed in a post-paid
wrapper, in a post-office box regularly maintained by the
Government of the United States at 80 Centre Street, New York,
New York 10013, directed to said Attorney at the address
within the State designated by him for that purpose.

Delene Silverman

Sworn to before me this
9th day of May, 1974

Joel H. Sacks
Assistant Attorney General
of the State of New York